ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

94-97

In the Matter of	)	
	)	
Expanded Interconnection with Local Telephone Company Facilities	)	CC Docket No. 94-97
	)	
Southwestern Bell Telephone Cos. Revisions to FCC Tariff No. 73	)	Transmittals Nos. 2383, 2388, 2392, 2397, 2407
	)	
To: The Commission	)	

OPPOSITION TO SWB'S APPLICATION FOR REVIEW BY THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS"), pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d), hereby opposes the Application for Review of the Common Carrier Bureau's decision in CC Docket No. 94-97, DA 94-1421, released December 9, 1994 ("Virtual Collocation Tariff Order"), filed January 9, 1995, by Southwestern Bell Telephone Company ("SWB").

I. SWB'S APPLICATION FOR REVIEW FAILS TO COMPLY WITH THE COMMISSION'S RULES.

The Commission made an unequivocable ruling in Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, FCC Rcd 5154 (1994)("Virtual Collocation Order") that potential interconnectors have the right to offer interconnector-designated equipment ("IDE") to the LECs, and that such offers should serve as presumptive IDE rate ceilings (Virtual Collocation Order at ¶ 124):

"More importantly, in purchasing equipment, LECs do not have an incentive to obtain the lowest possible price, since their costs will be passed on to their competitors, the interconnectors ... LECs must base the direct costs of providing this equipment on the lowest purchase price reasonably available to them to serve an interconnector. In applying this standard, we would find probative the price at which an interconnector may offer to sell the desired equipment to the LEC." (Emphasis supplied.)

Despite this clear mandate, the virtual interconnection tariffs filed by SWB on September 1, 1994, contained outrageous preconditions for offers of IDE by an interconnector (SWB D&J at 4-5):

"SWBT will consider such offered prices [by interconnectors] to be reasonably set if the interconnector offers the price under the same terms and conditions it offers such equipment to any other purchaser of the equipment and, if the interconnector holds itself out as the least-cost provider, SWBT must be allowed to purchase as many units of the equipment as it desires, even if such equipment will be used by SWBT to provide service to others."

The Bureau's Virtual Collocation Tariff Order subsequently found these requirements to be "patently unlawful" (at ¶¶59-60):

"The Commission did not contemplate that a LEC would make its virtual collocation offering contingent upon whether the interconnector will sell the LEC unlimited units of equipment for the LEC to provide service to other customers ... Under SWB's provision, if an interconnector is unable to arrange for SWB to purchase, at the interconnector's offered price, as many units of equipment as SWB desires, the interconnector may have no choice but to obtain the equipment from SWB at a higher price.

"We also disagree with SWB that its tariff provision is a reasonable response to the Commission's requirement that virtual collocation offerings be generally available to similarly situated customers ... the Virtual Collocation Order specifically states that if the cost prudently incurred by LECs to service different interconnectors are different because the interconnectors are not similarly situated, the difference in the rates charged to different

customers does not constitute unreasonable discrimination under Section 202 of the Communications Act, 47 U.S.C. § 202. In light of the foregoing discussion, we conclude that SWB's equipment sale provision violates the Virtual Collocation Order. We further conclude that SWB's requirement that interconnectors sell it additional units of equipment constitutes an unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. §201 (b). As SWB's equipment sale provision violates both the Virtual Collocation Order and the Act, we reject that provision as patently unlawful." (Emphasis supplied.)

Section 1.115(b)(2) of the Commission's Rules, 47 C.F.R. §115(b)(2), expressly requires that applications for review "specify with particularity ... the factor(s) which warrant Commission consideration," and then lists: (1) conflict with precedent; (2) novel issues; and (3) need for reversal of existing precedent as the three potential factors, and requires that at least one be pleaded.

SWB's application should be denied as a procedural matter for failing to comply with Section 115(b)(2). Not only has SWB failed to specify any of the three required factors, it fails to even discuss the content of the Virtual Collocation Tariff Order decision. Instead, SWB contents itself with repeating the same arguments it made in response to ALTS's protest.

II. THE BUREAU WAS CLEARLY CORRECT TO STRIKE SWB'S TARIFF REQUIREMENTS CONCERNING THE SALE OF INTERCONNECTOR-DESIGNATED EQUIPMENT("IDE").

Aside from SWB's fatal procedural error in never discussing the manner in which it contends the Virtual Collocation Tariff Order is improper, it is apparent the Common Carrier Bureau's decision on this issue is well founded. Boiled down to its

essence, SWB argues that unless it is allowed to use Individual Case Base ("ICB") pricing, it must be allowed to obtain unlimited amounts of IDE-offered equipment in order to be able to meet any unforeseen need, and thereby avoid any discrimination claims (SWB Application at 7-8).

This is total nonsense. As the Bureau correctly pointed out, an interconnector who offers to sell the same IDE at a lower price to an LEC than another interconnector is "not similarly situated," and thus creates no exposure for SWB of unreasonable discrimination.[1]

Finally, SWB's lament that submission of unduly low IDE offers might cause "obviously inappropriate overhead recovery" is equally without merit (SWB Application at 8-9). It is procedurally unfounded because the only argument made in SWB's Reply to Protests was that such an allocation "would be confiscatory and would constitute a taking" (at 27-28). SWB's Application for Review now avoids making any such claim, apparently realizing that allocation mechanisms simply shift the manner of recovery, not the amount. Instead, SWB now argues that its overhead recovery would not be "equitable" (SWB Application at 8). Since SWB made no argument below about the "equity" of allocation among different services, and instead limited itself

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[1] Furthermore, explained the Bureau (at ¶58): "SWB's provision may have the collateral effect of interfering with the interconnector's right to specify reasonably the equipment dedicated to its use."

to a confiscation argument, it should not be allowed to raise this new contention for the first time in its Application.

Even if SWB's "equity" claim were properly raised, however, SWB misperceives the fundamental nature of overhead allocations. All overhead recovery mechanisms are arbitrary in the sense they are not linked, and can not be linked, to direct economic causation. This absence of causation might seem exaggerated in the case of a $1 IDE overhead allocation, but it is no different in substance than the different prices -- and thus the differing associated overhead allocations -- created by such "arbitrary" factors as equipment vintages, differences in product margins, etc. SWB's inability to offer an alternative allocation mechanism amply demonstrates the fundamental functionality of the present mechanism.

III. THE OVERHEAD LOADING FACTORS USED BY THE BUREAU WERE ENTIRELY APPROPRIATE.

The Rate Adjustment Factors ("RAFs") ordered in the original physical co-location proceeding stemmed from the LECs' failure to eliminate double-counting of certain costs in specific rate elements that were also recovered in the LECs' overhead factors (Order Designating Issues for Investigation, MM Docket No. 93-162, released June 9, 1993: "Designation Order;" ¶ 35): "We find the LECs have established rate elements for expanded interconnection specifically to recover costs that would ordinarily be included as FDC overheads on all rates". Accordingly, the Common Carrier Bureau calculated RAFs reflecting

its estimate of this double-counting, as well as the effect of reallocating General Support Facilities ("GSF"), and required the carriers to refile rates reflecting this adjustment (id. at ¶ 38).[2]

It was apparent the same deficiencies still existed in the RBOCs' virtual interconnection tariffs, though they were almost impossible to quantify because of the lack of explanation. As the Bureau pointed out, Bell Atlantic and SWB's tariffs (at ¶16):

> "not only use some of the highest overhead loadings reported by the LECs, but also impose the highest total charges for virtual collocation service. For example, the monthly total charge per DS1 for providing interconnection for 100 DS1 circuits, excluding the terminating equipment charge, is $79 for Bell Atlantic and $33 for both SWB and US West. These charges far exceed those of other large LECs, who impose charges ranging from $8 (for CBT and certain United companies) to $23 (for GSTC California)."

In the face of such huge disparities, and the lack of any analysis of the Bureau's reasoning, SWB's complaints about the Bureau's loading factors are plainly without merit.[3]

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[2] This decision was affirmed by the Commission in First Report and Order, CC Docket No. 93-162, Phase I (released November 12, 1993; ¶¶28-34.

[3] See the Bureau's comment at n. 49:

> "Although SWB recognize these services [DS1 and DS3] are comparable, it nonetheless fails to compare them properly. To justify its overall rate for virtual collocation, SWB compares it to the much higher rate it charges for DS1 electrical channel termination service. Absent any adjustment to allow for differences in equipment requirements, this comparison is flawed."

CONCLUSION

For the foregoing reasons, ALTS requests that Southwestern Bell's application for review of the Common Carrier Bureau's Virtual Collocation Tariff Order be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, copies of the foregoing OPPOSITION TO SWB'S APPLICATION FOR REVIEW BY THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES were served via hand delivery* or first class mail, postage prepaid, to the parties listed below.

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